88- 1852

Supreme Court, U.S.
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No.

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

BRADLEY FACILITIES, INC.,

Petitioner,

v.

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION FOR THE STATE OF CONNECTICUT,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

Submitted by:

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QUESTIONS PRESENTED

I. This Court has held that the Contracts Clause requires heightened scrutiny when a state seeks to impair a contract to which it is a party. This case raises the related and unresolved question whether heightened scrutiny is also mandated in the review of a state's calculation of the compensation owing to a private party from such an impairment.

II. In this case, the State of Connecticut terminated its contract with petitioner and awarded petitioner $146.38 for an asset valued in excess of one million dollars. Petitioner contends that the award is fundamentally unfair and violates the Takings Clause of the Fifth and Fourteenth Amendments.

LIST OF PARTIES

No parties other than those listed in the caption of this case participated in the proceedings below.

Petitioner Bradley Facilities, Inc. is a consortium of the following air freight forwarders and airlines: Emery Air Freight Corporation, American Airlines, Inc., Eastern Airlines, Flying Tigers and Air Express International Corporation.

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Respondent.

PETITION FOR WRIT OF CERTIORARI
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CONNECTICUT SUPREME COURT

The petitioner Bradley Facilities, Inc. prays that a writ of certiorari issue to review the judgment of the Connecticut Supreme Court rendered on December 27, 1988.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 209 Conn. 480, and is reprinted in the Appendix hereto, p. 1a, infra.

The decision of the Connecticut Superior Court state trial reference has not been reported. It is reprinted in the Appendix hereto, p. 40a, infra.

JURISDICTION

The judgment of the Connecticut Supreme Court was rendered on December 27, 1988. Petitioner's timely Motion for Reargument was denied on January 18, 1989. (A copy of the Order denying petitioner's Motion for Reargument is reprinted in the Appendix hereto, p. 39a, infra.)

On April 12, 1989, Justice Marshall issued an order extending the time for

filing this petition for writ of certiorari to and including May 12, 1989.

The jurisdiction of this Court to review the judgment of the Connecticut Supreme Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 10 of the United States Constitution provides in pertinent part:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law.

Section 13a-76 of the Connecticut General Statutes provides in pertinent part:

> Any person claiming to be aggrieved by the assessment of such special damages or such special benefits by the commissioner may, at any time within six months after the same has been so filed, apply to the superior court for the judicial district within which such land is situated or, if said court is not in session, to any judge thereof for a reassessment of such damages or such benefits so far as the same affect such applicant, and said court or such judge, after causing notice of the pendency of such application to be given to said commissioner, shall appoint a state trial referee to make such reassessment of such damages or such benefits. . . . If the amount of the reassessment of such damages awarded to any such property owner exceeds the amount of the assessment of such damages by the commissioner for such land, such trial referee shall award to such property owner such appraisal fees as such trial referee determines to be reasonable.

Section § 13b-42(e) of the Connecticut General Statutes provides in pertinent part:

> The commissioner may, in the name of the state, purchase, take or acquire any interest, in whole or in part, in land, buildings, equipment or facilities that he has sold, leased or granted in any state airport, state airport site or any part thereof pursuant to subsection (b) of this section. The commissioner's determination that such purchase, taking or acquisition is necessary shall be conclusive. Any taking shall be in a manner prescribed in section 13a-73 for the taking of land for highway purposes.

STATEMENT OF THE CASE

This case involves an attempt by the State of Connecticut to deprive petitioner of a contract right valued in excess of one million dollars. The courts below accepted respondent's contention that only nominal compensation was necessary for the termination of its contract with petitioner. Petitioner submits that the decisions below failed to apply the heightened scrutiny required under the Contracts Clause and the Takings Clause, where the State has deprived a party of rights under a contract to which it is a party. Petitioner further submits that the award of $143.68 upheld below is fundamentally unfair and constitutes a taking of its property without just compensation.

In 1961, the State of Connecticut requested petitioner to assist it in providing air freight facilities at Bradley International Airport, Windsor Locks, Connecticut. [T. 2-3].* At the State's request, petitioner entered into a written twenty-year lease with the State for land at the airport and agreed to construct an air cargo facility on the land. [T. 3; Pl.Ex. A (excerpted at 59a)]. Petitioner was further granted two five-year options and the right to sublet space in the facility. [Pl.Ex. A].

Petitioner complied with its obligations under the lease and constructed an air cargo building, spending in excess of one million

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* The symbols "[T.__]" and "[T_2.__]" denote references to the first and second volumes of trial transcript. The symbol "[Pl.Ex.__]" denotes references to petitioner's trial exhibits. The symbol "[R.__]" denotes references to the Record on Appeal.

dollars for construction and improvement of the facility. [T_2. 128-34]. In 1982, the facility was fully rented, with leases extending into 1987. Petitioner was receiving gross annual rentals of $296,750.00 and net profit of $225,560.00 per year. [T. 59].

In 1975, the State requested petitioner to relinquish its leasehold interest in a portion of the leased premises. [T. 20-26]. Petitioner agreed to do so, and in return the State and petitioner determined a fixed rental price for the option periods of petitioner's lease. [Pl.Ex. G]. Petitioner exercised its two five-year options in December 1979, and the lease was not due to expire until August 30, 1992. [T. 27-28; Pl.Ex. H, I].

In response to petitioner's exercise of its lease options, respondent advised petitioner that because of future expansion

projects at the airport, it intended to condemn petitioner's leasehold interest. [T. 36; Pl.Ex. I]. Under Connecticut law, while the State has an inherent right to take private property for public use, that right "lies dormant until set into motion by legislative enactment." Northeastern Gas Transmission Co. v. Collins, 138 Conn. 582, 586, 87 A.2d 139 (1952). At the time the State entered into its lease with petitioner, and continuing through 1981, the State did not have authority to condemn its own leases for airport land. [T_2. 115; Pl.Ex. O]. Accordingly, in 1981, respondent drafted and requested the Connecticut legislature to pass legislation authorizing respondent to condemn leasehold interests in airport lands, which the legislature did. [T_2. 115]. Respondent further had set aside one million dollars to pay for peti-

tioner's leasehold interest. [T. 31-33; Pl.Ex. J].

There can be no question that the legislation enacted, Connecticut General Statutes §13b-42(e), was directed solely to petitioner's lease and was intended to change the existing rights between petitioner and the State by affording the State a previously non-existent right to condemn petitioner's leasehold interest. As State Senator Thomas Serrani, Chairman of the Senate Transportation Committee, stated during legislative debate on the legislation:

> [T]hey're [the Department of Transportation] in a situation where they must condemn a lease on the property at Bradley. This would allow the Department again to relocate cargo facility owned by the Bradley Facilities, Inc. The B.F.I. has had a twenty year lease with ten [year] renewal option. They're currently in the 19th year of the lease and D.O.T. department would like to be able

> to condemn their own lease with this amendment. Now presently the Department of Transportation can condemn a fee simple property interest and they're seeking to do the same here with a leasehold (inaudible). Without the amendment the State of Connecticut, their hands would be tied in the negotiating process at Bradley Airport ...

[24 S. Proc., Part 8, 1981 Sess. at 2566].

As Senator Serrani made clear in remarks the next day, respondent requested the legislation because, unlike leases subsequently granted by respondent, petitioner's 1961 lease contained no clear understanding that condemnation of the leasehold was part of the agreement. [Id. at 2611].

In mid-1982, petitioner instituted an injunction action to restrain respondent's taking of the leasehold interest. [T. 40-41]. The parties resolved the action through entry of a stipulation [53a] which provided, inter alia, that no condemnation

would occur until another air freight facility had been built and that if petitioner's leasehold interest were condemned, the date of the condemnation would be deemed to be August 30, 1982. [54a-55a]. The stipulation expressly provided that petitioner's "agreement with said condemnation date shall not be deemed a waiver of any of its rights in connection with any condemnation award or acquiesence with or to the position of the State or defendant thereto." [55a].

In April 1984, respondent filed a Notice of Condemnation taking petitioner's leasehold interest and awarding petitioner one dollar in compensation for its lease. [Pl.Ex. L]. Respondent did not seek to condemn the title to the premises since it already owned the premises. [See T. 95]. Petitioner vacated the premises in July 1984. [T. 48-49].

In August 1984, petitioner instituted an appeal of the award of condemnation in Connecticut state court at Hartford, pursuant to Connecticut General Statutes §13a-76, [R. 1], and the matter was ultimately referred to a state trial referee for trial in September 1986 and March 1987. [R. 11].

At trial, respondent did not contend that the amount awarded constituted just compensation for respondent's leasehold interest. Rather, although respondent had previously represented to the Connecticut legislature that its lease with petitioner contained no understanding concerning condemnation of petitioner's leasehold interest (and although, as discussed below, its position was directly contrary to the interpretation of the lease by respondent's Transportation Counsel [<u>see</u> pp. 16-17, <u>infra</u>; Pl.Ex.

P]), respondent argued at trial that Article 28 of the lease governed the amount of any award and superseded petitioner's statutory and constitutional right to just compensation for the taking. [See, e.g., T. 100-01].

Respondent's invocation of Article 28 was plainly disingenuous. At the time the lease was signed and at all times thereafter, the federal government possessed the right to condemn the State's land at Bradley Airport, including the land leased to petitioner. [See, e.g., T. 95]. The parties' lease contained a standard condemnation clause providing, in the event of condemnation of the demised premises, for allocation of any condemnation award between landlord and tenant. [66a-69a]. The lease provision, Article 28, provided that the tenant's share of any condemnation award was to be determined based on the amount of its con-

struction costs, the length of the time remaining on the lease, and any dimunition in rental value resulting from the condemnation. [66a].

Article 28 is plainly inapplicable to any condemnation by the State of petitioner's leasehold interest. [See Pl.Ex. P at 2]. The provision is expressly directed to a condemnation of the "entire Demised Premises, or so much thereof that the remainder is not useful to the Tenant" [66a]; and the term "demised premises" is defined in the lease to mean "the particular premises shown outlined in red" on a site plan attached to the lease depicting the land owned by the state subject to the lease "(which particular premises so shown, with the building and improvements to be constructed thereon, are hereinafter called the 'Demised Premises')." [61a].

Article 28 unambiguously differentiates between a condemnation of the demised premises -- owned, of course, by the State -- and one of the tenant's leasehold interest, in a later paragraph dealing with a temporary taking which begins: "If ... the whole or any part of the Demised Premises or of the building or of Tenant's interest under this lease shall be taken or condemned by any competent authority for temporary use or occupancy ..." [68a (emphasis added)].

Indeed, a memorandum [Pl.Ex. P] prepared by respondent's Transportation Counsel in December 1980 expressly states that Article 28 "was not intended to be used by the State:"

> As we have discussed before, I believe that the condemnation clause was not intended to be used by the State for termination purposes. I believe this clause relates to a taking by the Federal government or any other agency specifically authorized to acquire property at the airport. The

> language of this provision indicates that the landlord would also be receiving some award and the terms go on to describe how the landlord and the tenant will share in such proceeds. Obviously, as we are the taking authority we would not be sharing an award but would be issuing an award.

[Id. at 2].

Respondent contended at trial that under Article 28 the award to petitioner for its leasehold interest should be $146.38 [$T_2$. 136], even though petitioner's expert appraiser -- whose qualifications were stipulated to by respondent [T_2. 50] -- valued the leasehold interest at $1,066,000.00. [$T_2$. 54; Pl.Ex. R]. Respondent at no point contended that its proposed award was adequate actual compensation for the loss of the leasehold right.

The trial court subsequently adopted respondent's argument that Article 28 should be controlling, and applying the formula set

forth in Article 28, awarded petitioner $146.38. [52a]. The trial court denied petitioner's motion for articulation of the basis for this conclusion. [R. 36].

Petitioner argued in the trial court that respondent's refusal to pay just compensation would constitute an inequitable and unlawful invalidation of respondent's contract with petitioner. [Pl's Trial Mem. dated August 29, 1986 at 4, 7-8; 14-15; Pl's Mem. dated October 8, 1986 at 4, 7-8]. Petitioner cited, as one authority for this argument, this Court's decision in U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) [Id. at 8; 8], and urged the trial court to set aside respondent's award of $1.00 and award "full and just compensation" to petitioner. [Id.].

A majority of the Connecticut Supreme Court affirmed the trial court's decision,

adopting the State's argument that Article 28 should be read to apply to this condemnation. [1a, 13a-19a]. On appeal to the Connecticut Supreme Court, petitioner expressly argued that the award violated its rights under the Contracts Clause of the United States Constitution and the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. [Appellant's Brief at 30-34]. The Connecticut Supreme Court considered and rejected petitioner's federal constitutional contentions in its decision, [33a-36a], focusing on the impairment of contract claim as the basis for petitioner's takings claim as well. [33a].

Justice Callahan, dissenting in the Connecticut Supreme Court, argued that it was clear that Article 28 was not applicable to this condemnation. [37a-38a].

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ADDRESS AND DETERMINE THE STANDARD OF REVIEW APPLICABLE UNDER THE CONTRACTS CLAUSE AND THE TAKINGS CLAUSE TO A STATE'S DETERMINATION OF COMPENSATION FOR IMPAIRMENT OF ITS CONTRACTUAL OBLIGATIONS.

This case presents an unresolved question concerning the standard of review applicable to a state's assessment of compensation for the taking of a right under a contract to which the state is itself a party.

This Court has held that a state's impairment of a contract is constitutional under Article I, §10, if it is "reasonable and necessary to serve an important public purpose." United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977); see Home Building and Loan Assoc. v. Blaisdell, 290 U.S. 398, 444-45 (1934). The Court has further distinguished impairments of contracts between private parties from impair-

ments of contracts to which the State is a party. In the former case, courts should "properly defer to legislative judgment as to the necessity and reasons of the particular measure;" Energy Reserves v. Kansas Power & Light, 459 U.S. 400, 412-13 (1983). In the latter case, "particular scrutiny" of a modification of a contract is warranted; Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978); "because the State's self-interest is at stake." United States Trust Co. v. New Jersey, 431 U.S. at 26; see Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 505 (1987); Energy Reserves v. Kansas Power & Light, 459 U.S. at 413.

This case presents the issue whether such heightened scrutiny is applicable to a state's determination of the compensation owed to a party when the state has effected

a taking of that party's rights under a contract between them. This issue, although applicable whenever a state impairs its own contractual obligation with a private party, has never been addressed by this Court. Petitioner submits that constitutional protections provided by the Contracts Clause of Article 1, §10 of the United States Constitution and the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution require close scrutiny of the state's assessment of damages owing for the taking of such a contract right.

It is clear that if close scrutiny is applied here, the nominal award made by the State cannot survive.

In this case, petitioner had, at the time of condemnation, a leasehold interest valid for ten more years producing net profit in excess of $225,000.00 per year.

Under Connecticut law, a valuation of the leasehold interest property included the ten-year option period. Canterbury Realty Co. v. Ives, 153 Conn. 377, 384, 216 A.2d 426 (1966). Moreover, petitioner had constructed, at the State's request pursuant to the lease, an air freight facility costing in excess of one million dollars. Petitioner's appraiser testified at trial, without rebuttal, that the fair market value of petitioner's lease was $1,066,000.00, and respondent had set aside one million dollars to purchase petitioner's leasehold interests.

Furthermore, the nominal award approved in this case is not supported by a fair reading of the parties' agreements and is contrary to the position respondent maintained in the Connecticut legislature, where it acknowledged that because petitioner's

lease was twenty years old, it contained no understanding as to the State's rights of condemnation. It is also directly contrary to the opinion of respondent's Transportation Counsel, who expressly stated in a memorandum concerning this condemnation in December, 1980 that Article 28 is not applicable to a condemnation by the landlord-State. [Pl.Ex. P at 2].

Petitioner does not contend that the State was barred from condemning its leasehold interests by the absence of legislative authority to condemn a leasehold interest at the time the lease was executed. See West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532 (1848). Petitioner does contend, however, that it is patently unfair for the State to argue that the terms of the lease were intended by the parties to limit petitioner's right to adequate compensation for

condemnation by the State of petitioner's leasehold interest, when the State acknowledges that such condemnation was unanticipated by the parties.

In upholding the State's award of nominal damages, the lower courts adopted the tortured reading of the parties' lease asserted by respondent. The issue presented by this petition is not simply whether respondent's analysis of Article 28 might be upheld; petitioner recognizes that this Court does not sit to review state law contract actions. The issue, rather, is standard of review: Are courts required, under the contracts and takings clauses, to scrutinize closely the calculation of compensation owed for the taking of a right created by a contract to which the state is a party?

Under such scrutiny, the award here must be vacated. As Justice Callahan stated in

his dissent, "it appears clear to me that the condemnation clause in the lease was not intended to apply to a taking of the [petitioner's] leasehold interest by the lessor, the [respondent] Commissioner of Transportation." [37a].

II. THE COMPENSATION AWARDED PETITIONER BY THE STATE FOR PETITIONER'S LEASEHOLD INTEREST IS SO PATENTLY INADEQUATE AND SO CLEARLY VIOLATES THE TAKINGS CLAUSE REQUIREMENT OF JUST COMPENSATION THAT RELIEF FROM THIS COURT IS MANDATED.

The State's conduct here is so inequitable that this Court's review is mandated. After initially inducing petitioner to enter into this lease and invest over one million dollars to construct an air cargo facility, the State has deprived petitioner of a million dollar contract right for nominal damages on the purported basis of a condemnation clause that the State itself acknowledged was inapplicable.

The Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution prohibits the State from terminating petitioner's contract rights without just compensation. The award here is so fundamentally unfair and so plainly does not constitute just compensation for the taking involved, that review is warranted. See United States v. General Motors Corp., 323 U.S. 373 (1945).

CONCLUSION

For the foregoing reasons, petitioner prays that its Petition for a Writ of Certiorari be granted.

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